Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

FOOD EXPRESS, INC., a California corporation,

Petitioner,

v.

LARIE E. BOSTAIN and LAURIE JO BOSTAIN, husband and wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a state applies its overtime wage law to hours worked by interstate truck drivers in other states, does the extraterritorial application of that law violate the Commerce Clause of the United States Constitution?

2. In applying Washington's overtime wage law to hours worked by interstate truck drivers in other states, did the Washington Supreme Court improperly import the test for undue burden on interstate commerce, into the extraterritoriality analysis of the Commerce Clause of the United States Constitution?

3. Where a state applies its overtime wage law to hours worked by drivers in other states, does that law impose an undue burden on interstate commerce, offending the Commerce Clause of the United States Constitution?

4. When a state applies its overtime wage law to interstate truck drivers compelling motor carriers to modify the routes and hours of such drivers to avoid the added financial burden of such overtime, does the law violate the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) ("FAAAA"), which preempts all state laws relating to the prices, routes, or services of a motor carrier?

STATEMENT PURSUANT TO RULE 29.6

Food Express, Inc. has no parent corporations and no publicly owned company owns 10% or more of Food Express' stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Appendices	v
Table of Cited Authorities	vi
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Petition	5
A. Summary of Reasons	5
B. Washington's Overtime Wage Law Violates the Commerce Clause As It Applies to Hours Worked by Interstate Truck Drivers in Other States	7
(a) Extraterritorial Application	9

Contents

Page

(b) The Washington Court Conflated This Court's Undue Burden and Extraterritoriality Analyses 14

(c) Washington's Overtime Wage Law Fails the *Pike* Balancing Test 16

C. The FAAAA Preempts Wash. Rev. Code § 49.46.130 If It Applies to Hours Worked in Other States 20

Conclusion 25

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of The State Of Washington Filed March 1, 2007 ... 1a

Appendix B — Opinion Of The Court Of Appeals Of Washington, Division 2 Dated May 17, 2005 ..... 44a

Appendix C — Amended Final Order And Judgment Of The Superior Court Of Washington For Clark County Dated And Filed February 19, 2004 .... 58a

Appendix D — Order Of The Supreme Court Of Washington Denying Motion For Reconsideration Filed June 20, 2007 ..... 65a

TABLE OF CITED AUTHORITIES

Page

United States Supreme Court Cases:

American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n, 545 U.S. 429, 125 S. Ct. 2419, 162 L.Ed.2d 407 (2005) 8, 14

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 79 S. Ct. 962, 3 L.Ed.2d 1003 (1959) 16

Bigelow v. Virginia, 421 U.S. 809 (1975) 9

BMW of North America, Inc. v. Gore, 517 U.S. 599 (1996) 9

Bonaparte v. Tax Court, 104 U.S. 592 (1881) 9

Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 97 S. Ct. 599, 50 L.Ed.2d 514 (1977) 8

Brown–Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 106 S. Ct. 2080, 90 L.Ed.2d 552 (1986) 9, 12, 14, 15

Page

California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 117 S. Ct. 832, 136 L.Ed.2d 791 (1997) 22, 24

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 10, 11, 13

Edgar v. MITE Corp., 457 U.S. 624, 102 S. Ct. 2629, 73 L.Ed.2d 269 (1982) 9, 14

Egelhoff v. Egelhoff, 532 U.S. 141 (2001) 22, 23

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 7

H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 69 S. Ct. 657, 93 L.Ed. 865 (1949) 8

Healy v. Beer Inst., Inc., 491 U.S. 324, 109 S. Ct. 2491, 105 L.Ed.2d 275 (1989) 9, 12, 14, 17

Hughes v. Oklahoma, 441 U.S. 322, 99 S. Ct. 1727, 60 L.Ed.2d 250 (1979) 8

Cited Authorities

Page

Kassel v. Consol. Freightways Corp. of Delaware,
450 U.S. 662, 101 S. Ct. 1309,
67 L.Ed.2d 580 (1981) 16

Levinson v. Spector Motor Serv.,
330 U.S. 649, 67 S. Ct. 931,
91 L.Ed. 1158 (1946) 20

Morales v. Trans World Airlines, Inc.,
504 U.S. 374, 112 S. Ct. 2031,
119 L.Ed.2d 157 (1992) ..... *passim*

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) 22, 23

Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 8

Pike v. Bruce Church, Inc.,
397 U.S. 137, 90 S. Ct. 844,
25 L.Ed.2d 174 (1970) ..... *passim*

Raymond Motor Transp., Inc. v. Rice,
434 U.S. 429, 98 S. Ct. 787,
54 L.Ed. 664 (1978) 16

Rodriguez de Quijas v. Shearson/Am. Express,
490 U.S. 477 (1989) 23

Page

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 22

United Haulers Ass'n, Inc.
v. Oneida-Herkimer Solid Waste Mgmt. Auth.,
__ U.S. __, 127 S. Ct. 1786 (2007) 8

Willson v. Black-Bird Creek Marsh Co.,
27 U.S. (2 Pet.) 245 (1829) 7

Federal Cases:

Abdu-Brisson v. Delta Airlines, Inc.,
128 F.3d 77 (2d Cir. 1997) 24

Am. Booksellers Found. v. Dean,
342 F.3d 96 (2d Cir. 2003) 15

ACLU v. Johnson,
194 F.3d 1149 (10th Cir. 1999) 15

Californians for Safe & Competitive
Dump Truck Transp. v. Mendonca,
152 F.3d 1184 (9th Cir. 1998), *cert. denied*,
526 U.S. 1060 (1999) 24

Carolina Trucks & Equip., Inc.
v. Volvo Trucks of N. Am., Inc.,
492 F.3d 484, 2007 WL 1953376 (4th Cir. 2007) .. 15

Cited Authorities

Page

Cotto Waxo Co. v. Williams,
46 F.3d 790 (8th Cir. 1995) 15

Dean v. Foods Co. v. Brancel,
187 F.3d 609 (7th Cir. 1999) 15

In re Jet Blue Airways Privacy Litig.,
379 F. Supp. 2d 299 (S.D.N.Y. 2005) 24

NCAA v. Miller,
10 F.3d 633 (9th Cir. 1993), *cert. denied*,
Tarkanian v. NCAA, 511 U.S. 1033 (1994) 15

New Hampshire Motor Transport Ass'n v. Rowe,
448 F.3d 66 (1st Cir. 2006), *cert. granted*,
__ U.S. __, 2007 WL 180122 (2007) 23, 25

United Airlines, Inc. v. Mesa Airlines, Inc.,
219 F.3d 605 (7th Cir. 2000) 23

Wine & Spirits Retailers, Inc. v. Rhode Island,
481 F.3d 1 (1st Cir. 2007) 15

Cited Authorities

Page

State Cases:

Bostain v. Food Express, Inc.,
127 Wn. App. 499, 111 P.3d 906 (2005) 4

Dep't of Labor & Indus. v. Overnite Transp. Co.,
67 Wn. App. 24, 834 P.2d 638 (1992),
review denied, 120 Wn.2d 1030 (1993) 3

Oltman v. Holland America Line USA, Inc.,
136 Wn. App. 110, 148 P.3d 1050 (2006) 13

Innis v. Tandy Corp.,
141 Wn.2d 517, 7 P.3d 807 (2000) 16

Voicelink Data Servs., Inc. v. Datapulse, Inc.,
86 Wn. App. 613, 937 P.2d 1158 (1997) 13

Page

Other Cases:

American Libraries Ass'n v. Pataki,
969 F. Supp. 160 (S. D. N.Y. 1997) 15

District of Columbia v. Schwerman Trucking Co.,
327 A.2d 818 (D.C. 1974) 3

Leonard v. Northwest Airlines, Inc.,
605 N.W.2d 425 (Minn. App. 2000),
review denied, (Minn. 2000), *cert. denied*,
121 S. Ct. 183 (2000) 24

RLH Indus., Inc. v. SBC Commc'ns, Inc.,
133 Cal. App. 4th 1277 (Cal. App. 2005),
review denied, (Cal. 2006), *cert. denied*,
127 S. Ct. 78 (2006) 15

Federal Statutes:

28 U.S.C. § 1257(a) 1

29 U.S.C. § 213(b)(1) 20

49 U.S.C. § 3101 20

49 U.S.C. § 14501(c)(1) 2, 20, 21

49 U.S.C. § 41713(b)(4)(A) 21

Page

State Statutes:

Wash. Rev. Code § 49.46.005 16

Wash. Rev. Code § 49.46.090 3

Wash. Rev. Code § 49.46.130(1) 2, 4

Wash. Rev. Code § 49.46.130(1)(f) 4

Wash. Rev. Code § 49.48.030 3

Wash. Rev. Code § 49.52.070 3

Other State Statutes:

Cal. Labor Code § 510(a) 11

Conn. Gen. Stat. § 31-76i(a) 11

820 Ill. Comp. Stat. § 105/3(d)(7) 11

Ind. Code Ann. § 22-2-2-3(p) 11

Ky. Rev. Stat. Ann. § 337.285 11

Md. Code Ann., Labor & Employ. § 3-415(c)(1) .. 11

Mass. Gen. Law Ann. Ch. 151 § 1A(8) 11

	Page
Minn. Stat. § 177.23(7), (16)	11
Nev. Rev. Stat. § 608.018(b), (f), (g)	11
N.C. Gen. Stat. § 95-25.14(c)(1)	11
43 Pa. Cons. Stat. Ann. § 333.105(b)(7)	11
R.I. Gen. Laws § 28-12-4.3(7)	11
Vt. Stat. Ann. Title 21 § 3384(b)(5)	11
W. Va. Code § 21-5C-1(f)(17)	11
Wis. Stat. § 272.04	11
Rules and Regulations:	
49 C.F.R. § 395	20
Restatement (Second) of Conflict of Laws § 188 (1971)	12
Or. Admin. R. 839-20-0125(3)	11
State Codes:	
Wash. Admin. Code § 296-128-011	4

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Page

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Dann Murray, James Hardman, "Understanding Compensation and Overtime Exemption Issues in the U.S. Trucking Industry," American Transportation Research Institute, January 26, 2007 6

H.R. Conf. Rep. No. 103-677, *reprinted in* 1994 U.S.C.C.A.N. 21, 22

H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. 21

www.atri-online.org/industry 6

OPINION BELOW

The Washington Supreme Court's opinion is reported at 159 Wn.2d 700, 153 P.3d 846. It is reprinted at Appendix A. The opinion of the Court of Appeals of Washington, Division 2 dated May 17, 2005 is reported at 127 Wn. App. 499, 111 P.3d 906 (2005) and is reprinted at Appendix B. The amended final order and judgment of the Superior Court of Washington for Clark County dated and filed February 19, 2004 is reprinted at Appendix C.

JURISDICTION

The Washington Supreme Court rendered its opinion in this case on March 1, 2007. A timely motion for reconsideration was denied on June 20, 2007. (Appendix D). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

Article I, § 8:

> The Congress shall have the Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Article VI, clause 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

Statutory Provisions

49 U.S.C. § 14501(c)(1) (the Federal Aviation Administrative Authorization Act – FAAAA):

> . . . a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

Wash. Rev. Code § 49.46.130(1):

> Except as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT OF THE CASE

Larie Bostain was an interstate truck driver for Food Express, Inc. ("Food Express"). Bostain worked on average 48 hours per week for the company, but never worked more than 40 hours per week in Washington. Bostain resided in Clark County, Washington. Food Express, Bostain's employer, has a terminal in Vancouver, Washington; the company is based in Arcadia, California, with three additional terminals in California

and one in Utah. Bostain drove for Food Express in various states during his tenure with the company.

Bostain was fired by Food Express for insubordination for refusing to comply with the company's mandates regarding hours worked in a week. Food Express applied the maximum hours standards of the United States Department of Transportation. Food Express fired Bostain after he refused to obey the company's direction not to exceed the maximum hours. Bostain then sued Food Express in Washington's Clark County Superior Court, claiming damages for past due overtime wages, interest, double damages, and attorney fees under Wash. Rev. Code §§ 49.46.090, 49.48.030, and 49.52.070. [1]

Since 1989, the Washington State Department of Labor and Industries ("Department") only counted those hours worked by employees within Washington in calculating overtime due to Washington employees.[2] Despite this long-standing

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[1] Washington's minimum wage statute Wash. Rev. Code § 49.46, ("MWA") covers both minimum and overtime wages. Wash. Rev. Code § 49.48.030 provides for fees in successful wage actions and § 49.52.070 provides for double damages and fees in such actions.

[2] Prior to 1989, the Department took the position that drivers who regularly spent more than 50% of their time in Washington were subject to the MWA. *Dep't of Labor & Indus. v. Overnite Transp. Co.*, 67 Wn. App. 24, 33, 834 P.2d 638 (1992), *review denied*, 120 Wn.2d 1030, 847 P.2d 481 (1993). The Department's interpretation comported with the D.C. Circuit's determination that an employee was based in the District for purposes of its wage laws if he or she worked more than 50% of the work time therein. *Williams v. M.T.A. Transit Co.*, 472 F.2d 1258, 1266 (D.C. Cir. 1972).

Subsequently, in *District of Columbia v. Schwerman Trucking Co.*, 327 A.2d 818, 825 (D. C. 1974), the D. C. Court of Appeals held that (Cont'd)

administrative policy, the Clark County Superior Court granted summary judgment to Bostain, awarding him damages for past overtime including for hours worked outside Washington State, along with interest and attorney fees (but not double damages). Appendix C. The Washington Court of Appeals reversed that summary judgment in *Bostain v. Food Express, Inc.*, 127 Wn. App. 499, 111 P.3d 906 (2005). Appendix B. The Washington Supreme Court granted review and reinstated the trial court's judgment in a 5-4 decision. Appendix A.

Rather than affirming the Department's 18-year bright line rule on the eligible hours for calculating an interstate truck driver's entitlement to overtime under Wash. Rev. Code § 49.46.130(1), the Washington Supreme Court concluded that hours worked by a driver outside Washington could be included in the 40-hour calculation, so long as the driver is a "Washington-based" employee. 153 P.3d at 856. The court minimized the practical and constitutional problems of determining how drivers were subject to Washington's overtime wage law, stating "it is difficult to conceive of circumstances where one who does not qualify as the employer of a Washington-based employee would be subject to the MWA's overtime pay regulations." *Id.* The court stated the test for determining if a employee was "based

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(Cont'd)

D.C.'s overtime wage law applied only to hours worked inside the District. In 1989, the Washington Legislature amended the MWA for interstate drivers, Wash. Rev. Code § 49.46.130(1)(f) providing that motor carriers were exempt from Washington's overtime wage law, which is based on an hourly wage rate, if those motor carriers had a compensation system that paid compensation "reasonably equivalent" to overtime to their employees. The Department adopted Wash. Admin. Code § 296-128-011 and Wash. Admin. Code § 296-128-012 to implement Wash. Rev. Code § 49.46.130(1)(f). § 012 defined overtime as " the amount of compensation paid for hours worked within the state of Washington in excess of forty hours per week."

in Washington," and therefore, subject to Washington's overtime wage law, would be resolved using choice of law principles:

> As to potentially inconsistent state laws respecting overtime, this claim implicates choice of law questions that routinely arise. As the Bostains maintain, if the employee is a Washington-based employee subject to Washington's MWA, the employer is not likely to be subject to the wage and hours statutes of another jurisdiction with respect to that employee.

153 P.3d at 855.

Four dissenting justices believed the majority's interpretation of Washington's overtime wage law violated the Commerce Clause, both in its extraterritorial application and under the *Pike*[3] balancing test. 153 P.3d at 862-63.

The Supreme Court of Washington denied reconsideration of its decision on June 20, 2007. Appendix D.

REASONS FOR GRANTING THE PETITION

A. Summary of Reasons

The decision of the Washington Supreme Court to apply Washington's overtime wage law extraterritorially to hours truck drivers work in other states should be reviewed by this Court because that decision ultimately disrupts the national trucking industry, an industry that carries nearly 70% of America's freight

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[3] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

and employs 2 million drivers in interstate commerce.[4] By the Washington Supreme Court's majority opinion, Washington's overtime wage law applies extraterritorially to hours worked by drivers in other states, effectively regulating commerce outside the state of Washington, in violation of the Commerce Clause. The Washington Supreme Court decision is in direct conflict with this Court's extraterritoriality decisions. U.S. S. Ct. Rule 10(c).

In reaching this result, the Washington Supreme Court improperly conflated the traditional Commerce Clause analysis of undue burden on interstate commerce with this Court's extraterritoriality analysis, when it applied the balancing test to a statute plainly having an extraterritorial effect. This application of *Pike* to statutes having extraterritorial effect flies in the face of this Court's rule that statutes having such an effect violate the Commerce Clause per se. U.S. S. Ct. Rule 10(b).

Moreover, if the *Pike* balancing test were applied, Washington's overtime wage law imposes an undue burden on interstate commerce when applied to interstate truck drivers. That law disrupts the uniformity of labor laws applicable to the national trucking industry, forcing motor carriers to alter the hours and routes of drivers. Balanced against that burden, Washington's law does not fulfill its ostensible purpose of encouraging Washington employment because motor carriers will assuredly avoid the employment of Washington-based drivers. U.S. S. Ct. Rule 10(c).

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[4] *See www.atri-online.org/industry*; *Dan Murray, James Hardman*, "Understanding Compensation and Overtime Exemption Issues in the U.S. Trucking Industry," American Transportation Research Institute, January 26, 2007, memorandum of amici curiae ATA/WTA in support of respondents' motion for reconsideration at 4-6.

Finally, Washington's expansive interpretation of its overtime wage law will likely compel motor carriers to restrict the hours of interstate truck drivers, alter their routes to avoid exposure to overtime wage claims, and perhaps to move their operations from Washington. Such an interpretation of Washington's overtime wage law necessarily affects prices, routes, and services of motor carriers and therefore is preempted by the FAAAA. This Court should grant review to resolve the scope of FAAAA. U. S. S. Ct. Rule 10(b-c).

B. Washington's Overtime Wage Law Violates the Commerce Clause As It Applies to Hours Worked by Interstate Truck Drivers in Other States

The Commerce Clause, Article I, sec. 8, clause 3 of the United States Constitution, grants jurisdiction over interstate commerce to the Congress of the United States. The Commerce Clause has long been understood to have a "negative" aspect that denies the States the power to discriminate against or unduly burden the interstate flow of articles of commerce. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824).[5] As early as 1829, this Court scrutinized a state enactment to determine if it intruded upon the federal power over interstate commerce. *Willson v. Black-Bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245, 252 (1829)

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[5] Chief Justice Marshall wrote in *Gibbons*:

> It has been contended ... that, as the word "to regulate" implied in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing ... There is great force in this argument, and the court is not satisfied that it has been refuted.

Id. at 209.

(upholding Delaware law authorizing company to build dam on creek in face of contention the dam interfered with interstate navigation because it was not "repugnant to the power to regulate commerce in its dormant state"). The Commerce Clause has long since come to be recognized as an implicit restraint on state authority, even in the absence of Congressional legislation on an issue. *See, e.g., United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, __ U.S. __, 127 S. Ct. 1786, 1792-93 (2007); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995) (dormant Commerce Clause may prohibit state taxation even where Congress has failed to legislate on the issue).

While this dormant Commerce Clause analysis is still sometimes controversial, *see, e.g., American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 439 (2005) (concurring opinion of Thomas, J.), this Court has steadfastly adhered to the analysis because of the Court's long standing recognition that the analysis vindicates the constitutional goal of an area of trade free from state interference. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (stating that "[i]t is now established beyond dispute" that the Commerce Clause "by its own force creates an area of trade free from interference by the states" (citing and quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)).[6]

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[6] That the Framers intended that the Commerce Clause ensure free trade among the states was "so obvious and so fully recognized" they spent little time at the 1787 Convention explaining their specific intent. *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534 (1949). However, this Court has fully recognized that the Framers knew the problems under the Articles of Confederation and "the tendencies toward economic Balkanization that had plagued the Colonies," justifying a limitation of state power under the Commerce Clause. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

It is clear, for example, that a statute regulating activities in another state violates the dormant Commerce Clause per se. The Washington Supreme Court ignores the extraterritorial impact of its overtime law created by its decision and then compounds the problem by importing the *Pike* undue burden analysis of the Commerce Clause into its treatment of extraterritoriality. The Washington court's analysis of its overtime wage law also fails of the *Pike* balancing test.

(a) *Extraterritorial Application*

Under our Constitution, a state is without authority to enact laws intruding upon the internal affairs of another state even in the guise of preserving the health and welfare of its own citizens. *Bigelow v. Virginia,* 421 U.S. 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); *BMW of North America, Inc. v. Gore,* 517 U.S. 599, 570-01 (1996) (Congress could enact a national policy on disclosure of presale car repairs, but a single state could not do so, imposing its policy on the others). In our federal system, each state is independent of all others in its ability to legislate with reference to its own jurisdiction. *Bonaparte v. Tax Court,* 104 U.S. 592, 594 (1881).

This Court has expressed a particular distaste for state statutes or regulations that have an extraterritorial sweep, finding them to violate the Commerce Clause per se. *Edgar v. MITE Corp.,* 457 U.S. 624, 642 (1982) (If a state enactment applies on an extraterritorial basis, it offends the Commerce Clause per se, without the necessity of the *Pike* balancing test); *Brown–Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 579 (1986) (a statute which directly regulates interstate

commerce will "generally [be] struck down . . . without further inquiry.") Thus, in *Healy v. The Beer Institute*, 491 U.S. 324 (1989), this Court invalidated a Connecticut statute that required out-of-state breweries to affirm that their beer prices were no higher than those in neighboring states; the statute had the effect of regulating the prices at which out-of-state shippers could sell beer in other states. This Court stated "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause." 491 U.S. at 332. The Court also noted "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Id.* at 336.

Moreover, as an aspect of the extraterritoriality analysis, this Court has also instructed that if a state statute adversely affects interstate commerce by subjecting activities to inconsistent regulations, the statute cannot stand as against the Commerce Clause. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87-88 (1987) (addressing Indiana statute that conditioned the power to vote a controlling block of corporate shares on the approval of a majority of "disinterested" shareholders).

The Washington Supreme Court majority acknowledged this Court's long-standing extraterritorial analysis, but then baldly asserted "if the employee is a Washington-based employee subject to Washington's MWA, the employee is not likely to be subject to the wage and hour statutes of another jurisdiction with respect to that employee." 153 P.3d at 856. The Washington court plainly misunderstood how the American trucking industry operates, and certainly how Food Express operated.

Food Express has a terminal located in Vancouver, Washington. If Food Express directs a driver like Bostain to deliver loads to Food Express' Lathrop, California terminal, the driver would have to travel through Washington, Oregon, and California. Each of these states has a presumptive claim that its law should apply to the portion of the trip occurring within its borders. Oregon would not make such a claim as interstate truck drivers are not paid overtime wages under Oregon law. Or. Admin. R. 839-20-0125(3).[7] California, on the other hand, requires overtime wages to be paid to any employee working more than eight hours in a day. Cal. Labor Code § 510(a). Upon arrival in Lathrop, California, the driver could easily be directed by the terminal manager to hold over and work out of the Lathrop terminal, or another terminal, for a period of time sufficient to trigger California's law. In short, the actual reality of the American trucking industry generally, and of Food Express' business in particular, suggests that – contrary to the assumptions of the Washington Supreme Court – a trucking industry employer is *quite* likely to be subject to the wage and hour statutes of other jurisdictions with respect to the work of its (so-called) "Washington-based" driver employees, contrary to this Court's determination in *CTS Corp.* that activities in interstate commerce must not be subjected to inconsistent regulation.

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[7] Many of the 50 states exempt truck drivers from their overtime wage laws. *See, e.g.*, Conn. Gen. Stat. § 31-76i; 820 Ill. Comp. Stat. § 105/3(d)(7); Ind. Code Ann. § 22-2-2-3(p); Ky. Rev. Stat. Ann. § 337.285(2)(c); Md. Code Ann., Labor & Employ. § 3-415(c)(1); Mass. Gen. Law Ann. Ch. 151 § 1A(8); Minn. Stat. Ann. § 177.23(7),(16); Mont. Stat. Ann. § 39-3-406(2)(a); Nev. Rev. Stat. § 608.018.3(f); N.C. Gen. Stat. Ann. § 95-25.14(c)(1); 43 Pa. Cons. Stat. Ann. § 333.105(b)(7); R.I. Gen. Laws § 28-12-4.3(a)(7); 21 Vt. Stat. Ann. § 384(b)(5); W. Va. Code § 21-5C-1(f)(17); Wis. Admin. Code, Dept. of Workforce Devel., § 272.04(4). These states recognize the safety purpose of federal law and its Fair Labor Standards Act ("FLSA") exemption for trucking. *See* n.11 *infra*. Such exemptions are consistent with a smoothly operating national trucking system.

This Court's precedents make plain that Washington may not "project its [wage and hour] legislation into other States by regulating the price to be paid for [labor] . . . in those States." *Brown-Forman Distillers*, 476 U.S. at 583 (citing and quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (brackets omitted)). Rather, it is for these other states to decide whether and how to regulate the price of that labor, including whether and to what extent to require overtime pay. The Washington Supreme Court nonetheless presumes to suggest that a "project[ion]" of Washington's overtime requirements is valid, so long as the projection is grounded in a choice of law analysis. The Washington court offers no authority for what is, in fact, a proposition wholly without support in Commerce Clause extraterritoriality jurisprudence – that a state may project its wage and hour legislation into other states, and regulate the price paid for labor in another state, so long as the result can be squared by the projecting state with *its own* choice of law rules. The problem, of course, is that Washington will still be "directly control[ling] commerce occurring wholly outside" the state's boundaries and this will exceed "the inherent limits of the enacting State's authority" and be invalid because of its extraterritorial reach. *Healy*, 491 U.S. at 336.

The Washington court's approach to the determination of whether a driver is "Washington-based" necessarily requires Food Express and every other motor carrier doing business in Washington to undertake a choice of law analysis to determine if a driver must be paid overtime under Washington law for hours worked outside of Washington.[8]

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[8] Washington applies the most significant contacts analysis of the *Restatement (Second) of Conflict of Laws* § 188 (1971), for contracts of employment. Resolution of this issue could be further complicated by

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Because a driver's hours of operation and route of travel can vary dramatically from week to week, no motor carrier could hope to predict beyond the week at hand what law should apply to that driver's work. And even for the week at hand, the Washington Supreme Court's approach requires motor carriers to conduct a full-blown choice of law analysis to determine if that driver was entitled to overtime under Washington law. The correct application of choice of law principles is often a mysterious exercise for lawyers; it will prove an unending nightmare for motor carrier staffers not schooled in legal intricacies, as they struggle to determine, week in and week out, whether a driver was "based in Washington" and therefore owed overtime under Washington's overtime wage law for every hour over 40 hours worked that week – no matter in what state the work actually took place. Also, given the inherently imprecise and uncertain nature of choice of law analysis, it is likely that more than one state will from time to time claim an interest in regulating the hours worked by truck drivers within their jurisdiction, thereby subjecting a motor carrier to different and inconsistent regulations – a result squarely forbidden by *CTS Corp.* and related precedents.

This Court should grant review to reaffirm its bright line rule that extraterritorial application of statutes offends the Commerce Clause.

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contractual choice of law provisions that are routinely enforced in Washington. *See, e.g., Oltman v. Holland America Line USA, Inc.*, 136 Wn. App. 110, 148 P.3d 1050 (2006); *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 937 P.2d 1158 (1997).

(b) *The Washington Court Conflated This Court's Undue Burden and Extraterritoriality Analyses*

A state statute violates the Commerce Cause if it discriminates against interstate commerce on its face, *e.g., American Trucking Ass'ns, Inc. v. Michigan Public Service Commission*, 545 U.S. 429, 433 (2005), or (even if not facially) it places an undue burden on interstate commerce. *E.g., Pike v. Bruce Church, supra.* Whether a state statute places an undue burden on interstate commerce is determined by application of this Court's "balancing test," which weighs a state regulation's burden on interstate commerce against the local interest being served by the regulation; the test also examines whether that local interest could be served as well by less burdensome alternatives. *See Pike,* 397 U.S. at 142 (explaining that a Commerce Clause balancing test violation occurs when "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits" of a challenged regulation and noting that the extent of the burden tolerated depends on whether the purpose of the regulation "could be promoted as well with a lesser impact on interstate activities.").

The Washington Supreme Court holds that the MWA may be applied to out-of-state hours because Food Express has shown no "'sweeping extraterritorial effect' *that would outweigh the local benefits' of the MWA.*" 153 P.3d at 856 (quoting *State v. Heckel,* 143 Wn.2d 824, 24 P.3d 404, 412 (2001), in turn quoting *Edgar v. MITE Corp.,* 457 U.S. 624, 642 (1982)) (emphasis added). This holding squarely conflicts with *Healy, Brown-Forman Distillers,* and *Baldwin*, which erect a per se bar against statutes having such an impermissible extraterritorial effect, regardless of the alleged "local benefits," and do not require a *Pike* balancing.

Following this Court's lead, the federal circuit courts of appeal have uniformly held that laws having an extraterritorial effect violate the dormant Commerce Clause per se. *See, e.g., Dean Foods Co. v. Brancel,* 187 F.3d 609, 616 (7th Cir. 1999) (The Supreme Court has not "backed away from the long-established core principle that a statute or regulation that violates the extraterritoriality ban is per se invalid."); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.,* 492 F.3d 484, 492 (4th Cir. 2007) (recognizing that laws "with forbidden extraterritorial reach" are "virtually *per se* invalid under the Commerce Clause'") (quoting *Brown-Forman*); *NCAA v. Miller,* 10 F.3d 633, 640 (9th Cir. 1993) (state laws having an impermissible extraterritorial effect are per se invalid); *Am. Booksellers Found. v. Dean,* 342 F.3d 96, 104 (2d Cir. 2003) (same); *ACLU v. Johnson,* 194 F.3d 1149, 1161 (10th Cir. 1999) (same); *Cotto Waxo Co. v. Williams,* 46 F.3d 790, 793 (8th Cir. 1995) (same); *Wine & Spirits Retailers, Inc. v. Rhode Island,* 481 F.3d 1, 15 (1st Cir. 2007) (same).

The Washington Supreme Court and the California Court of Appeals have now held that the *Pike* balancing test applies to such laws. *See RLH Indus., Inc. v. SBC Commc'ns, Inc.,* 133 Cal. App. 4th 1277, 1288-93, 35 Cal. Rptr.3d 469, *review denied,* (Cal. 2006), *cert. denied,* 127 S. Ct. 78 (2006). The Washington court explicitly asserted that extraterritoriality analysis is a facet of the *Pike* test. 153 P.3d at 855.[9] The district court in *American Libraries Ass'n v. Pataki,* 969 F. Supp. 160 (S. D. N.Y. 1997), felt obliged to analyze New York's internet obscenity law for minors both under an extraterritorial *per se* analysis and a *Pike* balancing test. Extraterritoriality is a distinct

[9] The Washington Supreme Court in *Heckel* also stated the extraterritorial analysis was appropriately regarded as a facet of the *Pike* balancing test. 24 P.3d at 411.

analysis of the Commerce Clause, separate from the *Pike* balancing test.

This Court should grant review to reaffirm its long-standing policy that the extraterritorial application of state laws violates the Commerce Clause *per se*.

(c) *Washington's Overtime Wage Law Fails the Pike Balancing Test*

Applying the *Pike* balancing test, this Court has invalidated statutes that unduly burden interstate commerce even when the state has claimed a strong safety rationale for its law. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (state mandate to use special mud flaps on trucks); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (state statute banning 65-foot double trailers); *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662 (1981) (state law banning trailer combinations longer than 55 feet). The purpose of Washington's overtime wage law is not even safety-based, but rather "to encourage employment opportunities within the state." RCW 49.46.005; *see also, Innis v. Tandy Corp.*, 141 Wn.2d 517, 538, 7 P.3d 807 (2000) ("The purpose of overtime wage laws is to encourage employers to spread employment by hiring additional workers rather than paying overtime."). Although Washington claims its overtime law has a police power purpose, a speculative police benefit purpose is not enough to overcome the burden Washington's overtime wage law imposes on interstate commerce.

Contrary to the naïve understanding of the Washington Supreme Court regarding the trucking industry and the burden that would be placed on interstate commerce by radically different approaches to overtime wages for drivers operating in various states, 153 P.3d at 856, computing eligibility for overtime

based on total hours worked per week rather than just the hours worked in the State of Washington places a significant burden on interstate commerce and does not advance the goal of Washington's overtime law to increase employment opportunities in the state.

In undertaking the balancing of local benefits against the burden on interstate commerce, the Washington court identified the principal local benefit as being the establishment of minimum employment standards and encouragement of employment opportunities within the state. 153 P.3d at 855.

Against this local benefit are a number of undue burdens placed on interstate commerce by the Washington court's determination that Washington's overtime law applies to a driver's extraterritorial hours.

First, Washington's approach defeats the national uniformity for the trucking industry, a goal that constitutes the core policy of the Commerce Clause. Under the Washington court's analysis, the trucking industry would be exposed to varying, possibly inconsistent, state regulations governing driver eligibility for overtime. *See Healy*, 491 U.S. at 336 (a state regulation should be examined as to the "effect [that] would arise if not one, but many or every, State adopted similar legislation."). Many states with different overtime policies could lay claim to jurisdiction over an interstate truck driver passing through the state on a trip chain.

If overtime eligibility is not tied to work performed in a particular state, an array of jurisdictional questions arise: For example, which state's law controls? Is it where the company is located, where the driver resides, where the majority of the work took place, where the work in excess of 40 hours took place?

The states approach the payment of overtime in different ways, illustrating how this nexus analysis has a critical impact on interstate activities. A driver would seek coverage under the most favorable state law through which he or she traveled. Carriers would alter routes and hours accordingly. A motor carrier would assert the "nexus" is more appropriately with a state that eschews overtime for interstate drivers, and schedule drivers' routes accordingly. The uniformity envisioned by the Commerce Clause would be defeated.

Second, Washington's interpretation of its overtime law would be disruptive to the day-to-day operation of the national trucking industry. If Washington's overtime requirement is based on total weekly working hours, not just those worked in Washington, it imposes enormous burdens on motor carriers.

Interstate truck driving is a unique profession requiring extended stretches of time on the road, followed by longer than usual off duty periods. Most interstate motor carriers operate nationally or over large multi-state regions, and the highly competitive, low profit margin nature of their businesses requires a business model that efficiently utilizes equipment and drivers. Most carriers employ "trip chains" that route their trucks on a series of movements around the country. Neither the carrier nor the driver knows the legs of that journey at the beginning of the chain. For example, a truck and driver may be dispatched from a terminal in Washington to deliver a load in Los Angeles. When that delivery is completed, dispatchers then find the closest next available load, which could be destined for anywhere in the country. The driver then embarks on the next link in the trip chain wherever dispatched, whether to Chicago, New York, Miami, or even back to Washington. Then, upon delivery of that next load, the driver is again routed, based upon what load becomes available nearest to that point of delivery. This type of

cycle may go on for two weeks or more, before the driver is routed back to his or her home base. *See,* Wash. Supreme Court amicus brief of ATA/WTA at 9-10.

The highly unstructured nature of truck driving (with unknown and widely varying waiting times for load assignments, highly variable loading and unloading times, and unforeseeable traffic and weather conditions) does not neatly fit into an 8-hour day or a 40-hour workweek. Rather, drivers must be free, within the timelines set by the federal hours-of-service regulations, to work the irregular hours needed to get the job done. If carriers were not free to utilize their drivers within the federal limitations and instead were responsible for overtime on their multi-state operations, it would throw those operations into financial turmoil and would compromise safety by forcing carriers, because of financial considerations, to adopt artificial hourly limits inconsistent with operational needs.

Balanced against the burdens it places on interstate commerce, the Washington court's interpretation of its overtime law offers little benefit. As explained by amici to the Washington Supreme Court, the Court's decision will not increase Washington-based employment in the trucking industry but will instead force interstate motor carriers to move their terminals and operations to other states. Alternatively, it could result in motor carriers eliminating employed drivers and using owner-operators, independent contractors who are commonly used in the trucking industry. Washington law, for example, provides that such owner operators of trucks are not employees of motor carriers for worker compensation purposes. Wash. Rev. Code § 51.08.180. *See Wash. St. Dep't of Labor & Indus. v. Mitchell Bros. Truck Line, Inc.*, 113 Wn. App. 700, 54 P.3d 711 (2002). The ostensible purpose of Washington's overtime wage law of expanding Washington employment would not be advanced by applying the statute to hours worked outside of Washington.

C. The FAAAA Preempts Wash. Rev. Code § 49.46.130 If It Applies to Hours Worked in Other States

The Washington Supreme Court cavalierly addresses the issue of FAAAA preemption in a footnote, asserting that despite this Court's broad interpretation of an analogous preemption clause in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), this "Court has since pulled back from its previous interpretation." 153 P.3d at 856 n.9.[10] The Washington court's conclusion that the FAAAA does not preempt application of Washington's overtime wage laws outside the state is in conflict with this Court's decisions and those of the federal circuit courts.

Under the Washington court's interpretation of its overtime law, the statute is preempted. The FAAAA broadly preempts any state "law related to a price, route, or service of any motor carrier." 49 U.S.C. § 14501(c)(1); *see id.* § 41713(b)(1).[11] This provision has been interpreted consistently to preempt any state

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[10] The Washington court discussed the issue whether the MWA is preempted by the Motor Carriers Act, 49 U.S.C. § 3101, *et seq.*, 153 P.3d at 854, but that jurisprudence on federal preemption of Washington's overtime wage law is unrelated to, and actually predates, the FAAAA.

[11] The federal government already regulates the work of interstate truck drivers. During the trip chains of interstate trucking drivers, a driver's hours are regulated by the Department of Transportation under the federal hours-of-service rules (49 C.F.R. § 395). The hours-of-service regulations have been carefully crafted by that federal agency to best promote safety consistent with the operational necessities of interstate truck transportation. In fact, because of the safety-related nature of the federal hours-of-service regulations, the FLSA expressly excludes such interstate truck drivers from eligibility for overtime. *See* 29 U.S.C. § 213(b)(1). *See also, Levinson v. Spector Motor Serv.*, 330 U.S. 649, 677 (1946) (recognizing that Congress in enacting the FLSA exemption put "safety first").

law that expressly references or significantly affects a price, route, or service of any motor carrier. Washington's overtime law, if based on out-of-state hours worked, would affect the price, route, and service of a motor carrier and is therefore preempted by the FAAAA.

Beginning with the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, Congress made a commitment to deregulate the motor carrier industry. At that time, Congress found that "[t]he existing [federal] regulatory structure ha[d] tended in certain circumstances to inhibit innovation and growth and has failed, in some cases, to sufficiently encourage operating efficiencies and competition." H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. at 2283, 2292. It soon became clear, however, that federal deregulation could not serve its purposes if any state regulation persisted at all. In 1994, "[t]o ensure that the States would not undo federal deregulation with regulation of their own" (*Morales,* 504 U.S. at 378), Congress enacted the broad preemption provision of the FAAAA. Under the FAAAA, any "law related to a price, route, or service of any motor carrier" is preempted. 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A).[12] FAAAA preemption completes a federal transportation policy that promotes uniformity by preempting state regulation.

The scope of the FAAAA's preemption is broad. In *Morales*, this Court found that a virtually identical preemption provision in the Airline Deregulation Act preempted a state law if it either: (1) makes "express reference" to carriers' price, route, or service, or (2) has a "forbidden significant effect" on price, route, or

[12] The central purpose of the FAAAA preemption was to free trucking from the "patchwork" of state regulatory requirements that had developed prior to the FAAAA's enactment. H.R. Conf. Rep. No. 103-677, at 87, *reprinted in* 1994 U.S.C.C.A.N. at 1759.

service. *Morales*, 504 U.S. at 388. In enacting the FAAAA, Congress expressly adopted "the broad preemption interpretation adopted by the United States Supreme Court" in *Morales*. H.R. Conf. Rep. No. 103-677, at 83, 1994 U.S.C.C.A.N. at 1755.

The "retreat" suggested by the Washington Supreme Court has occurred in the context of ERISA cases, *not* the Airline Deregulation Act or FAAAA cases, and does not square with what Congress intended in basing its FAAAA preemptive language on *Morales*. Moreover, while the Washington court perceived the "retreat" from *Morales* in this Court's decisions in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), and *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997), cases pertaining to whether a state law "relates to" ERISA for purposes of preemption, the Washington court blithely ignores *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), a decision in which this Court overruled a Washington Supreme Court decision and held a state law was "related to" ERISA and was preempted. ERISA continues to preempt state laws that relate to its provisions.

In *Travelers* and *Dillingham*, this Court held that a mere connection to ERISA was insufficient to permit federal preemption in traditional fields of state regulation.[13] The Court eschewed "uncritical literalism" in applying the ERISA pre-emption, *Dillingham*, 519 U.S. at 325, and has held that where the state law has only a "tenuous, remote, or peripheral

[13] Even where a statute addresses a traditional state police power concern, preemption is nonetheless possible. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (ERISA preempted New York's human rights law that prohibited employers from structuring employee benefit plans so as to discriminate on the basis of pregnancy.)

connection with covered plans," pre-emption does not follow. *Travelers,* 514 U.S. at 661 (*quoting District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. at 130, n.1).

In *Egelhoff,* far from "retreating" from ERISA preemption, this Court held that a Washington statute providing for automatic revocation of any spouse's designation of another spouse as a beneficiary of a nonprobate asset upon their divorce was preempted. This Court held that insofar as the statute governed payment of benefits in ERISA plans, a central ERISA concern, it was preempted because it disrupted the uniform administrative scheme envisioned by Congress for ERISA plans.

If there is to be a "retreat" from *Morales,* it is not the prerogative of the Washington Supreme Court to anticipate it. As the First and Seventh Circuits have held: "[I]f developments in pension law have undercut holdings in air-transportation law, it is for the Supreme Court itself to make the adjustment. [Lower court'] marching orders are clear: follow [Supreme Court] decisions until the Supreme Court overrules them." *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 608 (7th Cir. 2000); *N.H. Motor Transp. Ass'n v. Rowe,* 448 F.3d 66, 76 (1st Cir. 2006) (same). Congress intended the Airline Deregulation Act and FAAAA preemption provisions to mirror *Morales;* there is no reason that a subsequent putative narrowing of ERISA preemption should affect FAAAA preemption. *See Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling it own decisions.").

The Washington Supreme Court's approach to FAAAA preemption is similar to that of the Second and Ninth Circuits. *See Californians for Safe & Competitive Dump Truck Transp. v. Mendonca,* 152 F.3d 1184, 1188-89 (9th Cir. 1998); *Abdu-Brisson v. Delta Airlines, Inc.,* 128 F.3d 77, 82-83 (2d Cir. 1997); *see also, In re Jet Blue Airways Privacy Litig.,* 379 F. Supp. 2d 299, 314-15 n.11 (S. D. N.Y. 2005) (following the Second Circuit's approach to noting that "[o]ther courts have been understandably reluctant to narrow the Supreme Court's preemption analysis in *Morales* based upon subsequent interpretations of the ERISA provision"); *Leonard v. NW Airlines, Inc.,* 605 N.W.2d 425, 430 (Minn. App. 2000) (noting that "[s]ome federal courts have adopted the Court's narrowed ERISA preemption analysis in resolving controversies arising under the ADA's preemption clause," but finding it unnecessary to choose between following "the *Morales* textual standard" or the "narrowed" approach), *review denied,* (Minn. 2000), *cert. denied,* 121 S. Ct. 183 (2000).

Although *Dillingham* and *Mendonca* both involved California's prevailing wage laws, the mere fact that Washington's overtime wage law is at issue here does not prevent the FAAAA's preemptive language from applying. California's prevailing wage statute dates from 1937 and has been interpreted consistently since that time. The *Mendonca* court could not find an *acute* impact of paying prevailing wages on routes, prices, or services. Here, by contrast, the Washington court's interpretation of the Washington MWA is new and has an *acute* impact on the activities of motor carriers as described *supra.* The Washington court's interpretation of its overtime wage *directly* affects the price of goods delivered by motor carriers, the routes over which drivers will travel, and the services rendered by such carriers.

This Court should grant review to re-affirm the application of *Morales* to FAAAA preemption for the trucking industry.[14]

CONCLUSION

The decision of the Washington Supreme Court strikes to the heart of the national trucking industry, disrupting how that industry handles interstate truck drivers. That court's decision is contrary to this Court's Commerce Clause jurisprudence and Congressional preemptive intent in the FAAAA.

The analysis of that state's overtime law by the Washington Supreme Court unconstitutionally applies extraterritorially, offending the Commerce Clause. That court's decision reaches far beyond the Washington state borders, affecting every single motor carrier in America. Its interpretation of the Washington overtime law renders it subject to the FAAAA's preemptive effect because it defeats the intent of Congress to preempt virtually all state statutes dealing with trucking. This Court should accept review.

Respectfully submitted,

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[14] This Court has granted a writ of certiorari in *Rowe v. New Hampshire Motor Transport Ass'n* (Cause No. 06-457). At a minimum, any decision on the writ in this case should await this Court's disposition of the preemption question in *Rowe*.